Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JACQUELINE SCHROERING - - - *Petitioner*

versus

THE COURIER-JOURNAL & LOUISVILLE TIMES - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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January 10, 1997

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31 pp

QUESTIONS PRESENTED FOR REVIEW

Are statements, defamatory per se at common law, that impute inappropriate courtroom behavior and legal incompetence to a sitting judge absolutely privileged under the First Amendment to the Constitution of the United States because purportedly incapable of being proven true or false?

May "Absence of malice" be said to be conclusively established in a media/public figure defamation case where the plaintiff has not been given a fair opportunity to complete her discovery?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

OPINIONS AND ORDERS BELOW

The Supreme Court of Kentucky entered an Order denying discretionary review in this case on October 16, 1996, No. 96-SC-468-D, which Order may be found in the Appendix of this Brief as Exhibit A.

The Court of Appeals of Kentucky rendered its Opinion in this case on April 26, 1996, No. 95-CA-520-MR, which Opinion may be found in the Appendix of this Brief as Exhibit B.

The Jefferson Circuit Court of the Commonwealth of Kentucky entered an Order dismissing the Plaintiff's claims in this case on January 26, 1995, No. 94-CI-2472, which Order may be found in the Appendix of this Brief as Exhibit F.

The Jefferson Circuit Court of the Commonwealth of Kentucky entered an Order restricting the Plaintiff's opportunity to conduct discovery in this case on August 12, 1994, No. 94-CI-2472, which Order may be found in the Appendix of this Brief as Exhibit E.

JURISDICTION OF THE COURT

The Order sought to be reviewed was entered on October 16, 1996.

The jurisdiction of this Court is invoked under 28 United States Code §1257(3).

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The Petitioner, Jacqueline K. Schroering, was elected to the position of District Judge for the 30th Judicial Circuit (Jefferson County) of the Commonwealth of Kentucky in November, 1985. She was re-elected to the position four years later. In 1993, Deborah Moloney defeated Schroering in the general election.

The Respondent, Louisville *Courier-Journal*, published several editorials during this election contest that clearly attempted to create the impression that Judge Schroering was incompetent. The relevant portions of these editorials of May 15, 1993 and October 21, 1993 appear in the Opinion of the Court of Appeals of Kentucky, attached hereto as Exhibit B. In addition, the newspaper published an edi-

torial cartoon on July 3, 1993 that portrayed Judge Schroering as some sort of looney bird (Transcript of Record of the Jefferson Circuit Court, hereinafter TR, p. 8; Exhibit C, attached hereto).

The statements that formed the core of Judge Schroering's lawsuit are emphasized in the opinion of the Kentucky Court of Appeals. More specifically even, these statements are as follows:

> Male and female lawyers complain of disturbing displays of emotionalism in her courtroom . . . And, more critical [than her low bar poll rankings], complaints persist about her legal acumen and ability to articulate her legal reasoning. Lawyers say they regularly leave her courtroom wondering whether she grasped their argument or the law it was based upon.

In the later editorial, the newspaper referred to Judge Schroering's, ". . . uncertain grasp of law and [her] erratic temperament."

These statements were based upon editor Laurel Shackleford's interviews with 17 lawyers, computer-generated notes of which appeared at pages 169-176 of the record of this case. These notes indicated that nine of the lawyers made arguably negative comments about Judge Schroering's courtroom behavior and legal knowledge.

These comments, completely unedited for grammar and usage, are as follows, with the numbered "source" following the comment; first as to judicial temperment:

> Her mannerisms on the bench . . . it's like she's like a spoiled little girl. She makes faces (Source #1).
>
> JS became angry and started yelling at the atty: Mr. [redacted] you've asked that (question). i'm not going to allow you to intimidate and harass this witness. i remember thinking that wasn't judicious. She could have been more even keeled (Source #8).
>
> JS tempermentally unsuitable. Practiced before her.

Almost an instability. an immaturity. unpredictable. nice person. Seen her cry (Source #9).

[S]he got horrible judicial temperment . . . She'll fly off. . . she'll go on tangents (Source #7).

[S]he lacks the temperament to be a judge. Many people saw her break down and cry. . . . guy came in front of her and she started giving him a lecture, he started talking back, instead of saying you will be quiet—she went off on this female harange; said court is recessed and ran out the back (Source #10).

[H]er temperament is not very sound (Source #11).

Next as to legal knowledge and ability:

[D]oesn't have a good knowl of the law (Source #1)

[I] can't truthfull[y] tell you that she's a good judge that she knows the law and how to appl [it] Source #2).

I don't think she has the legal skills to make a fair disposition of the cases before her. . . [D]oesn't have an intimate or even passable knowledge of the law . . . If,., I had impt case and wanted a judge who would understand. . . the issues and have strength of character to do the right thing there are a no. of other judges I would choose first (Source #5).

She has an inability to develop a consensus as to what was the appropriate legal outcome. i will disagree with judges a lot, and that's part of the game. i feel i have done my job and judge their's if i can understand the rationale the court came to. i feel as though there's that understanding that [lawyers] and judges can reach . . . can't make conclu about what she knows about the law (Source #7).

Bias isn't the problem: she doesn't have a clue. she'll go on tangents; everyone will have a hard time following her; seeing how she reached her conclusions; has a hard time interpreting arguments (Source #7)

> I won't tell you she's an Einstein; sometimes I'm not sure where she's coming from when she makes rules . .. Obviously made a gross misstatement of the law when she said police couldn't arrest her brother because they didn't witness the incident (Source #8)
>
> Her legal ability is suspect (Source #11)
>
> On the bench she doesn't know the law . . . . inability to view cases critically and analytically . . . can't discuss meaty, heavy critical issues (Source #12).

Ms. Shackelford's notes also revealed the following positive comments concerning Judge Schroering's courtroom demeanor and legal knowledge and ability from five of the 17 sources:

> Her temperment has improved since when she first went on the bench (Source #4).
>
> Average in temperment (Source #5).
>
> She does know the law (Source #5)
>
> Temperment: average. I don't find that it's any better or worse than anyone else's (Source #6).
>
> No personal experience with jackie: I hear . . . complaints from members of the bar and her lack of judicial temperment and knowledge of the law but when I have spoken to real people they have been very complimentary (Source #7)
>
> Her reputation is not good among the bar . . . She's changed my impression because most of my impression was based on other members of the bar. I have not found her to be unfamiliar with any issues I've dealt with [concerning the law] Temperment: her emotional response to a lot of the ?'s would be perceived as being tempermental or emotional; in fact they demonstrate sincerity . . . when a woman judge gets emotional she's out of control; when men lose their tempers that's acceptable (Source #8).

The Petitioner, of course, denied the *Courier-Journal's*

assertion that she exhibited "disturbing displays of emotionalism in her courtroom," or that she lacked legal acumen or the ability to articulate her legal arguments (TR, pp. 230-232; This Brief, Appendix, Exhibit D. In addition, when she learned the specific information upon which the *Courier-Journal* based its defamatory editorial statements, she testified that:

1. She had never made faces, behaved like a "spoiled little girl," lost her temper, or engaged in "female harangues," in the courtroom (*Id.*, #2).

2. She had never yelled at an attorney in her courtroom (*Id.*, #4).

3. She had shed tears in the courtroom on two occasions, but hardly in a manner that evidenced any sort of outburst or lack of judicial decorum (*Id.*, #4).

4. Specific legal positions she had articulated, which the *Courier-Journal* had cited as evidence of her lack of legal ability were well-grounded in the law (*Id.*, #5).

5. All proceedings in her courtroom, as in every other Kentucky District Court, were officially recorded on audio tapes that are readily available to the press and general public (*Id.*, #5).

Ms. Shackleford made *no* effort to verify any of the statements that she received from her 17 "sources". She did not talk to others who may have been involved in the particular cases upon which the lawyers based their anecdotes (including Judge Schroering!), She did not examine the official record of Judge Schroering's Court. In addition, Ms. Shackleford never attempted to get "on the record" statements from attorneys or others who had experience with Judge Schroering. She also did not try to get up-to-date first hand information about Judge Schroering's performance, as by visiting her Courtroom while court was in session or sending a reporter to observe proceedings there.

* * * * *

Petitioner Schroering filed her lawsuit on May 12, 1994 (TR, pp. 1-8). The newspaper filed a motion to dismiss the lawsuit on May 23, 1994 (TR, pp. 14-67). At that stage of the proceedings neither Schroering nor the Court knew if the newspaper had any sources for the statements at issue in the case. Because of this Schroering agreed, and the Court ordered, that until further Orders of the Court discovery would be limited to the:

> . . . issues of the existence of sources as stated in the editorials and the information conveyed by these sources; and that in responding to said discovery requests Defendant is not required to disclose the identification of any confidential sources or any information that might lead to the identification of confidential sources (TR, pp. 86-87; Exhibit E, attached hereto)

Schroering did seek to discover the identity of Ms. Shackleford's sources by offering to agree not to sue any of them if the newspaper would divulge them and the sources would agree to being identified. The newspaper refused this offer (TR, p. 129, #11).

After the limited discovery described in Exhibit E, attached hereto, the Defendant moved for summary judgment. The Jefferson Circuit Court granted this motion on January 26, 1995 (TR, P. 244; Exhibit F, attached hereto). Petitioner appealed to the Kentucky Court of Appeals, which on April 26, 1996, affirmed the summary judgment for Respondent (Exhibit B, attached hereto). Petitioner then sought discretionary review from the Supreme Court of Kentucky, which declined to accept the case on October 16, 1996 (Exhibit A, attached hereto).

* * * * *

The federal questions sought to be reviewed in this Petition were raised by the Respondent, Defendant below, *Courier-Journal,* at every stage of the proceedings.

The newspaper responded to this lawsuit not with an Answer, but with a motion to dismiss under the Kentucky equivalent of FRCP 12. In this pleading, filed on May 23, 1994, the newspaper complained that the lawsuit sought, ". . . to trample the newspaper's and indeed the public's unequivocal constitutional guarantees of free speech and free press," (TR, p. 18, Motion to Dismiss, p. 2).

More particularly, the *Courier-Journal* asserted and argued in its motion to dismiss that its editorial statements of which the Petitioner complained were "pure opinion" and therefore protected under the First Amendment to the Constitution of the United States (*Id.*, pp. 31-34). As a subtext of this argument, the Respondent argued that the statements at issue in this case were Constitutionally protected under the First Amendment because they ". . . could not reasonably be interpreted as statements of fact," (*Id.*, Pp. 3440), both because of their "context" as editorials, and because they ". . . do not contain provable false assertions of fact," (*Id.*, pp. 34-42). Alternatively, the newspaper argued that even if its editorials were somehow defamatory despite their appearance as "opinion" as opposed to "fact, they were still not actionable under the First Amendment because they, "did not imply the existence of undisclosed facts," (*Id.*).

In this pleading, the newspaper cited numerous federal appellate opinions, some Kentucky cases, and the following opinions from this Court:

Philadelphia Newspapers, Inc. v. *Hepp*, 475 U.S. 767 (1980).

New York Times Co. v. Sullivan, 376 U.S. 254 (1969).

Masson v. *New Yorker Magazine, Inc.*, 111 S.Ct. 2419 (1991).

Ocala Star Banner v. Damron, 401 U.S. 295 (1971).

Milkovich v. *Lorain Journal Co.*, 110 S.Ct. 2695 (1990).

Monitor Patriot Co. v. Roy, 401 U.S. 263 (1971).

Herbert v. *Lando*, 441 U.S. 153 (1979) [dissent only].

When the Respondent's motion to dismiss was denied by the Jefferson Circuit Court, Respondent filed an Answer. In this pleading, as its "Third Defense," the newspaper asserted that its editorials, "are protected by the First Amendment of the United States Constitution . . . and cannot form the basis for this lawsuit," (TR, p. 102, Answer).

Thereafter, in its successful motion for summary judgment the newspaper argued that the anonymous statements of lawyers and judges recited earlier in this brief "substantiated" its editorial statements. It sought to analogize its actions in publishing the statements of which Judge Schroering complained to the practice of publishing the results of "bar polls" rating judicial candidates standing for election (TR, pp. 111-122, Motion for Summary Judgment), which practice enjoys protection from suit under the First Amendment to the Constitution of the United States.

The Jefferson Circuit Court, James Keller, Special Judge, dismissed Petitioner's lawsuit without a written opinion (TR, p. 244, Exhibit F, attached hereto).

The Kentucky Court of Appeals based its affirmance of this summary judgment upon an alleged absence of proof of "Constitutional" malice (Exhibit B, attached hereto) *and* upon the basis that:

> . . . it is clear that any statements made by the interviewed persons which reflected their personal opinions regarding appellant's performance as a judge *could not be proven false* . . . [emphasis added]

As authority for this proposition, the Court cited this Courts opinions in the cases of *Milkovich, supra*, and *Hepps, supra* (*Id.*).

The Kentucky Supreme Court declined to review the opinion of the Kentucky Court of Appeals without any comment (Exhibit A, attached hereto).

ARGUMENT

I

THE DECISION SOUGHT TO BE REVIEWED PRESENTS THE IMPORTANT FEDERAL QUESTION OF WHETHER OR NOT STATEMENTS THAT IMPUTE, INAPPROPRIATE COURTROOM BEHAVIOR AND LEGAL INCOMPETENCE TO A SITTING JUDGE ARE ABSOLUTELY PRIVILEGED UNDER THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE INCAPABLE OF BEING PROVEN TRUE OR FALSE.

In *Philadelphia Newspapers* v. *Hepps*, 475 U.S. 767 (1986), this Court ruled that the First Amendment to the Constitution of the United States requires that allegedly defamatory statements, in order to be actionable, must be provable as true or false in cases such as the one at bar, involving a media defendant and a public figure or official.

This legal principle permits the media to attack the very heart of the common law of defamation: the categorization of certain sorts of words as defamatory per se, and therefore actionable without proof of any special injury or damage. These classifications, of course, have been developed over the centuries since slander was first recognized in the manorial and justice's courts as an alternative to personal combat during the reign of Henry II, Neill, *On Defamation* (London: Butterworth, 1983), pp. 198-199.

One group of words long classified as defamatory per se are those imputing to an individual an inability to perform the duties of, or a lack of skill in his trade, calling, or profession, *Restatement, 2d of Torts*, §573. It is just such words, as we have seen, that are involved in the case at bar.

Another group of words defamatory per se bears mention as it was the subject of a recent opinion of this Court:

words that impute to an individual the commission of a crime, *Black's Law Dictionary*, 5th Ed., 1979, P. 28.

Despite these ancient common-law principles, and despite the obvious fact that juries routinely decide the factual basis for criminal accusations, the media defendant in *Milkovich* v. *Lorain Journal*, 110 S.Ct. 2695, 2707 (1990) vigorously argued that its having imputed the crime of perjury to a high school athletic coach was absolutely privileged under the First Amendment because it was not, ". . . sufficiently factual to be suspectible of being proven true or false."

Naturally, this court rejected the newspaper's argument.

Although the absolute defense for words incapable of proof of truth or falsity was first highlighted in the *Hepps* opinion, it received little attention until the *Milkovich* opinion appeared. This was apparently because this Court so completely demolished the media's formerly favored defense of "opinion" in *Milkovich*. The Court did this, of course, by emphasizing that the form of a statement is not controlling and that "opinions" that imply false and defamatory facts are just as damaging as more obvious statements of such facts, 110 S.Ct. at 2706-1707.

In its briefs for the Courts below, the Respondent pointed to several cases in which the newly favored defense of the media was at issue: *Dworkin* v. *L.F.P., Inc.*, Wyo., 839 P.2d 903 (1992), *Unelko Corp.* v. *Rooney*, 912 F.2d 1049 (9th Circ., 1990), *Phantom Touring, Inc.* v. *Affiliated Publications*, 953 F.2d 724 (lst Circ., 1992), and *Moldea* v. *New York Times Co.*-, 22 F.3d 310 (D.C. Circ., 1994) It also cited two Georgia cases, neither of which contained any reference to the First Amendment as such and both of which turned on the Georgia law of defamation and a free press.

In the *Phantom* case, the Court held that the defendant's alleged mischaracterization of the plaintiff, a false pre-

tender to the mantra of the, ". . . widely acclaimed Broadway show of the same name," as the Court's summary of its opinion put the matter, 953 F.2d at 724, was protected speech. This was because the defendant had revealed the factual premises of the statements at issue and because the statements were "rhetorical hyperbole," 953 F.2d 729-731.

In the case at bar of course, the Respondent most emphatically, did not reveal the purported factual basis of its statement that, "Male and female lawyers complain of disturbing displays of emotionalism in her courtroom." For all the reader of the Respondent's editorial knew, the Petitioner regularly browbeat witnesses, invited attorneys to "step out in the hallway," screamed hysterically, or as one judge of the Jefferson District Court is once reputed to have done, danced and sang upon the bench after listening to a criminal defendant's efforts to excuse his behavior. As we have seen, the Court of Appeals focused not on what the Respondent wrote in its newspaper, but on what its "sources" reportedly told its editor. This was obviously improper and focused the Court's attention away from the real issue in the case, which is the meaning of the actual words in Respondent's editorial.

In *Unelko*, the resident curmodgeon on "60 Minutes," Andy Rooney, had stated of the plaintiff's product, Rain-X, that it did not work. Unelko claimed that Rain X, . . . repels rain, facilitates window cleaning, and increases visibility," in the words of the Court, 912 F.2d at 1055. The Court *rejected* Rooney's claim that his statement was incapable of proof of truth or falsity. *Unelko*, therefore, offers no comfort for the Respondent in this case!

In *Dworkin*, 839 P. 2d at 915-916 the Court held that the words "militant feminist," "shit-squeezing sphincter," "publicity grabber," "foul-mouthed abrasive manhater," "crybaby," "foaming-at-the-mouth," and "censor" were too

loosely definable and subject to interpretation in a variety of contexts to be considered capable of being proven true or false. Furthermore, the Court stated that the average reader could not reasonably believe that the writer of this scatological prose was purporting to state actual or implied facts, *Id.*

The defamatory words in this case clearly bear no relationship to those at issue in the *Dworkin* Opinion.

In *Moldea*, the Court held that a charge of professional incompetence leveled at a professional writer was absolutely protected because purportedly incapable of being proven true or false. Respondent naturally argued below that *Moldea* required that this case be dismissed.

Certainly *Moldea* does stand for the proposition that individuals are no longer entitled to seek to vindicate their reputations for general attacks upon their competence in their trade, calling, or profession, *unless* the case can be distinguished as applying only to those who make their living by the pen (live by the pen, die by the pen).

Neither of the parties to Moldea sought to invoke this Court's jurisdiction.

Petitioner believes that the issue in Moldea and in this case is one of great federal importance that this Court should directly resolve. It is, of course, this: whether or not one entire category of words defamatory per se at common law, that of words imputing general incompetence to an individual in his trade, calling, or profession, should be effectively abolished as counter to the First Amendment to our Constitution because not provable as true or false.

Petitioner does not believe that this pleading is the place for her to do more than state the issue; she will have ample opportunity to set forth all of the reasons why she believes the First Amendment does not require such a sea-change in the law of defamation if this Court grants her

petition. However, she would be remiss if she did not point out that her case involves an important sub-issue that justifies the granting of this petition in and of itself.

In this case the Respondent not only charged the Petitioner with "legal incompetence," but also with *specific* injudicious behavior. Unlike the plaintiff in *Moldea*, who as a writer works in private, the Petitioner was a sitting judge, whose work is very public. Writers are judged by the "finished product" of their work; judges by a host of criteria, not the least of which is courtroom demeanor.

In short, the Respondent's statement that "Male and female lawyers complain of disturbing displays of emotionalism in her courtroom," is a particular and egregious assault upon a judge's reputation that is not readily analogous to anything negative that could be said about a writer's competence as a writer.

Furthermore, while the statement at issue in this case is defamatory at common law precisely because it imputes general incompetence to a judge, *Robbins* v. *Treadway*, Ky., 2 J. J. Marsh 540, *Cooper* v. *Lawrence*, 204 Ill. App. 261, it nevertheless is an even better candidate for an exemption from the First Amendment privilege attaching to statements not provable as true or false than a general charge of incompetence in one's trade, calling, or profession. This is because it more specifically imputes negative *behavior* to the judge than does a general charge of incompetence.

In this respect, of course, the defamatory statement in this case is more akin to a charge of criminal conduct than the statements disparaging the plaintiff writer in *Moldea*.

The peculiar facts of this case, therefore, present this Court with an excellent opportunity to precisely analyze and describe the boundaries of the recently articulated absolute protection afforded to words that are purportedly

not provable as true or false under the First Amendment to our Constitution. This is a federal question of the first magnitude.

II

"ABSENCE OF MALICE" MAY NOT BE SAID TO BE CONCLUSIVELY ESTABLISHED IN A MEDIA-PUBLIC/FIGURE DEFAMATION CASE WHERE THE PLAINTIFF HAS NOT BEEN GIVEN A FAIR OPPORTUNITY TO COMPLETE HER DISCOVERY.

As we have seen, the Petitioner was not permitted to conduct discovery beyond that which enabled her to identify the existence of Respondent's sources and the substance of the information that they had conveyed to the Respondent's editors.

Petitioner was not upset about this state of affairs during proceedings in the trial Court because that Court indicated that its summary judgment was based upon the purported status of the words of which Petitioner complained as protected opinion under the First Amendment.

Unfortunately, the Kentucky Court of Appeals, apparently justifiably uncomfortable with this particular basis for dismissing the Petitioner's claims, opined that:

> . . . the record contains nothing to suggest in any way either that the statements were made with knowledge that they were false, or that they were made in reckless disregard of the truth (Opinion of the Court of Appeals, Exhibit B, attached hereto)

At this point the Petitioner cried foul. She pointed out to the Supreme Court of Kentucky that she had been unable to conduct full discovery, and that she had a right to do this before responding to the "absence of malice" defense under *Herbert* v. *Lando*, 441 U.S. 153, 99 S.Ct. 1635 (1979).

Petitioner also argued to the Kentucky high court the considerable evidence of Constitutional malice that did exist upon the record of this case. For example, Petitioner pointed out that the statements of which she complained were based upon little more than unsubstantiated scuttlebutt that the Respondent did not even bother to convey to its readers. This is hardly surprising, since the average reader would then have been able to identify the "source" of the newspaper's conclusions as unsubstantiated scuttlebutt. More importantly, of course, if the newspaper had merely reported what its sources told its editors, the statements at issue might then, if true (which the Petitioner's affidavit indicates most were not), have become protected opinion under the First Amendment because based upon disclosed true facts.

As the statements stand, as we have seen, they are not protected opinion because they imply the existence of untrue and defamatory facts.

Even had the Respondent engaged in the less damaging conduct of merely repeating the statements of its sources, the evidence of reckless disregard for the truth would have been manifest. As the old Kentucky court of appeals (then the state's highest Court) said in *Vanover* v. *Wells*, 264 Ky., 461, 94 S.W.2d 999, 1000 (1936), and earlier cases:

> . . . every repetition of a slander is a willful publication of it, rendering the speaker liable to any action. Tale bearers are as bad as tale makers.

The "Constitutional revolution" in defamation law has not altered this ancient principle, *Restatement, 2d of Torts*, §576. Even without attempting to fathom the Respondent's "editorial processes" it is quite apparent that the statements at issue in this case were published with a reckless disregard for the truth.

Respectfully Submitted,

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APPENDIX

EXHIBIT A

SUPREME COURT OF KENTUCKY

96-SC-468-D
(95-CA-520-MR)

JACQUELINE K. SCHROERING - - - - - - - *Movant*

v.

THE COURIER-JOURNAL AND
LOUISVILLE TIMES COMPANY - - - - *Respondent*

Jefferson Circuit Court
94-CI-2472

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

King, J., not sitting.

ENTERED: October 16, 1996.

/s/ Robert F. Stephens
Chief Justice

EXHIBIT B

RENDERED: APRIL 26, 1996; 2:00 P.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

96-SC-468-D
(95-CA-520-MR)

JACQUELINE K. SCHROERING - - - - - - *Appellant*

v.

COURIER-JOURNAL AND
LOUISVILLE TIMES COMPANY - - - - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable James E. Keller, Special Judge
Action No. 94-CI-2472

OPINION AFFIRMING

BEFORE: DYCHE, GARDNER, and GUDGEL, Judges.

GUDGEL, JUDGE: This is an appeal from a summary judgment enter by the Jefferson Circuit Court in a libel action. Appellant contends that the trial court erred by granting appellee a summary judgment. We disagree. Hence, we affirm.

Appellant was a Jefferson District Court Judge from 1985 until 1993, when she sought re-election to the district court bench. On several occasions appellee published allegedly libelous editorials in its newspaper endorsing appellant's opponent, and appellant was ultimately defeated in her bid for re-election.

Appellant filed this action seeking compensatory and punitive damages against appellee and "unknown defendants" for having published the allegedly libelous editorials and an editorial cartoon. Initially appellee made a

motion to dismiss the action as meritless, but that motion was overruled except insofar as it pertained to a certain editorial cartoon.[1] Subsequently, after discovery was completed, appellee made a motion for summary judgment alleging that no material issue of fact existed and that it was entitled to judgment as a matter of law. After conducting a hearing on the motion the court granted appellee a summary judgment. This appeal followed.

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964), our nation's highest court held that:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

This rule was recently reaffirmed in *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991), wherein the Supreme Court held that a public figure who seeks to recover damages from a media defendant must specifically demonstrate, by clear and convincing evidence, that the defendant had serious doubts regarding the statement's truth or was highly aware that it was probably false. Moreover, mere negligence or journalistic carelessness in making such a statement does not in and of itself establish the existence of malice. *Masson, id.*; *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). *See also* 50 Am.Jur.2d *Libel and* Slander 32, 38 (1995). Further, at least where a media defendant is involved, statements addressing public concerns must be proven to be false before any liability for defamation may attach. *Milkovich* v. *Lorain Journal Co.*,

---

[1]No issue is before us on appeal regarding the dismissal of the claim insofar as it pertains to the editorial cartoon.

497 U.S. 1, 110 S.Ct. 2695, Ill L.Ed.2d 1 (1990); *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).

Here, it is undisputed that appellant was a public official when the offensive editorials were published, and her judicial race was clearly a matter of public interest or concern. That being so, *New York* Times and its progeny dictates that appellant bore the burden of proving that appellee made the alleged libelous statements with actual malice, in that appellee either knew that the statements were false or published them in reckless disregard of their falsity. Moreover, the statements are required to be ones which could be proven to be false. *Milkovich, supra; Hepps, supra.*

An editorial published by appellee on May 18, 1993, endorsed four judicial candidates, not including appellant, who were seeking votes in the upcoming primary election. It stated in pertinent part as follows:

> Today we conclude our recommendations for the May 25 primary with a discussion of Jefferson County's four contested judicial races. The top two vote getters in each contest will square off in November.
>
> Judicial races tend to be difficult for voters to assess. Unlike candidates in partisan contests, the aspirants are prevented by the judicial code of ethics from discussing how they'd handle specific types of cases.
>
> There are, nevertheless, ways to distinguish among contenders. Our recommendations are based on interviews with each candidate and discussions about them with lawyers and judges who have firsthand knowledge of their work. We have sought out a broad cross-section of public and private lawyers from small law firms and large. Also taken into consideration are the endorsements of the Citizens for Better Judges and the bar's evaluation of incumbents and its separate poll of all candidates.
>
> . . . .

> Jacqueline K. "Jackie', Schroering has her drawbacks as a judge, but the absence of caring isn't among them. She takes her work seriously, does it in a timely manner and is considered honest. Commendably, she is regarded as tough on domestic violence.
>
> There may be some justification for Judge Schroering's feeling that she has been treated unfairly by the Louisville Bar Association Judicial Candidate Poll - she may be the target of an unpopularity contest rooted in spite.
>
> Even so, after eight years on District Court, Judge Schroering has had more than ample opportunity to show what she can do and, by just about any measure, it falls short of the mark. *Male and female lawyers complain of disturbing displays of emotionalism in her courtroom. She has the worst bar poll ratings any judge has gotten since the poll began in 1982. And, more critical, complaints persist about her legal acumen and ability to articulate her legal reasoning. Lawyers say they regularly leave her courtroom wondering whether she grasped their argument or the law it was based upon. Voters got a taste of what they're complaining about last year when Judge Schroering's brother was arrested for allegedly assaulting his wife and she mistakenly argued that the law prevented arrests in such situations.* (The charge against him was later dismissed.) On balance it appears that there's little risk that either of her opponents would do a worse job. (Emphasis added.)

On October 21, 1993, appellee published another editorial concerning the upcoming general election which stated in pertinent part as follows:

> Incumbent Jackie Schroering should be retired. Her strengths as a judge, and she has some, are more than offset by her weaknesses. *Those gaps include an uncertain grasp of law and an erratic temperament, and they resulted in a stunning rebuke in this year's poll of lawyers:* 58 percent rated her as unqualified for the bench. No judge seeking re-election has ever been rated worse.

> She has tried to disguise the real issue by attributing criticism to venal lawyers and to resentment over some issues she has championed. But voters shouldn't be fooled. The issue is her competence on the bench, and she simply doesn't measure up. (Emphasis added.)

Regardless of how unfavorable the foregoing editorial statements may have been to appellant, the record contains nothing to suggest in any way either that the statements were made with the knowledge that they were false, or that they were made in reckless disregard of the truth. *See New York* Times, *supra*. Indeed, the interview notes taken by the editorial writer, which were provided to appellant during the discovery process, contain numerous statements in support of the published statements concerning appellant's judicial tenure. In fact, we note that appellant has evidently now abandoned her earlier contention that the published statements might not be supported by the interview notes.

Moreover, we are not persuaded by appellant's assertion that liability should attach herein because appellee should have conducted a more in-depth investigation before relying on the statements of the persons interviewed. As noted above, it is well settled that mere negligence or journalistic carelessness in conducting a media defendant's investigation cannot serve as the basis for a libel action. *See* Masson, *supra; Gertz, supra;* 50 Am.Jur.2d *Libel and Slander, supra.*

Finally, we are not persuaded that reversible error occurred because the trial court may have erroneously concluded that no statements of opinion could serve as a basis for appellee's possible liability for defamation. Although certain dicta set out in Gertz, *supra*, was widely interpreted by lower courts as creating "a wholesale defamation exemption for anything that might be labeled 'opinion,' " that interpretation was later specifically rejected by the Supreme Court on the ground that "[n]ot only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expres-

sions of 'opinion, may often imply an assertion of objective fact." *Milkovich*, 497 U.S. at 18, 110 S.Ct. at 2705. *See also Masson*, supra. In any event, since it is clear that any statements made by the interviewed persons which reflected their personal opinions regarding appellant's performance as a judge could not be proven false, it follows that no liability for defamation regarding them can attach regardless of whether those statements are characterized as factual or as statements of opinion. *See Milkovich, supra; Hepps, supra.*

Having reviewed the evidence in the light most favorable to appellant, we are constrained to conclude that there was no genuine issue of material fact as to whether appellee was guilty of legal malice in the publication of the offending editorials, and hence, that appellee was entitled to judgment as a matter of law. We hold, therefore, that the trial court did not err by granting appellee a summary judgment.

The court's judgment is affixed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:
Philip C. Kimball
Louisville, KY

BRIEF FOR APPELLEE:
Jon L. Fleischaker
Deborah H. Patterson
Louisville, KY

ORAL ARGUMENT FOR APPELLEE:
Jon L. Fleischaker
Louisville, KY

EXHIBIT C



EXHIBIT D

SPECIAL DIVISION

JEFFERSON CIRCUIT COURT

No. 94CI-02472

JACQUELINE K. SCHROERING - - - - - - *Plaintiff*

v.

COURIER-JOURNAL & LOUISVILLE TIMES COMPANY - - - - *Defendant*

AFFIDAVIT OF JACQUELINE SCHROERING

Comes now the affiant, Jacqueline Schroering, and after first being duly sworn, deposes and says as follows:

1. I am the plaintiff in this Action.

2. I do not believe that I was given to "disturbing displays of emotionalism," while I sat as a District Judge between 1986 and 1994; more particularly (to respond to the particular "information" set forth by the Defendant's unidentified sources) I did not make faces, behave like a spoiled little girl, lose my temper (or "fly off,"), or engage in "female harangues."

3. I have shed tears in the courtroom, but have never "broken down," or lost control of my emotions while in the Courtroom. The two occasions I remember involved a very frail elderly woman in disability court who was in a very sad situation and an occasion when an attorney was behaving in a particularly obnoxious manner. There may have been one other occasion in Small Claims Court but I do not remember the details. In none of these instances did any lawyer or person present appear to be "disturbed" in any manner by my behavior.

4. I have never yelled at an attorney, although I am sure that I have notified attorneys that I would not allow them to intimidate or harass a witness.

5. As to my legal acumen and ability to articulate my legal reasoning, I can testify as follows:

a. I did not ready anything in Ms. Shackleford's note that any one or more lawyers, ". . . regularly leave [my] courtroom wondering whether [I] grasped their argument or the law it was based upon," as stated in the editorial.

b. The Defendant made a "cause celebre" out of my arguing that my brother should not have been arrested when his then wife called the police and accused him of 4th degree assault. As the attached letter that I wrote to the newspaper clearly shows, my position was well-taken in that my brother maintained that he did not present a danger or threat thereof to others at the time, even if he had caused physical injury to his spouse, which he also denied [P. 2 of the letter sets forth KRS 431.005(2), the relevant statute]. The Defendants only example of my alleged legal incompetence in its May 15, 1993 editorial was my position on this issue.

c. Before I became a District Judge, I was an Assistant Commonwealth Attorney for four years, as well as a criminal defense attorney before that. As a District Judge, I either held probable cause hearings within 10 days, received a waiver from the Defendant, and/or released the Defendant from custody. I believe that I know the criminal law of Kentucky as well as any District Judge or attorney who regularly practices in that area. At the time I was a District Judge and continuing since then I met the qualifications to hold that position as set forth in the Kentucky Constitution, including, of course, being a licensed attorney.

d. I do not pretend to know the law completely. I was always willing to listen to arguments of counsel, and to study any briefs or authorities submitted or pointed out to me. I recall very few post-trial or post-

judgment motions or appeals from judgments that I entered while a District Judge, and almost no petitions or motions for extraordinary relief (prohibition, mandamus, habeas corpus). While the frequency of appeals may not be any sort of mark of the competence of the judge to whom error is assigned, the frequency and success of efforts to obtain extraordinary relief certainly is. I am willing to match my record in this department with that of any other District Judge who sat on the bench during my tenure as a judge in Jefferson County.

e. During my tenure on the bench, Jefferson District Court was a Court of record. The audio tapes of all courtroom proceedings were always available to the Defendant if it wanted to do a serious investigation of my performance as a judge from both the standpoint of courtroom decorum and the justice and legality of my rulings. I read nothing in the discovery obtained from the Defendant that indicated any of its agents, employees, or reporters ever did this.

Further, the affiant sayeth naught.

/s/ Jacqueline K. Schroering
Jacqueline K. Schroering, Affiant

Subscribed and sworn to before me by Jacqueline K. Schroering upon this the 30th day of December, 1994.

My commission expires: May 14, 1995.

/s/ [Illegible]
Notary Public

EXHIBIT E

DIVISION EIGHT (8)

JEFFERSON CIRCUIT COURT

No. 94-CI-02472

JACQUELINE K. SCHROERING - - - - - - *Plaintiff*

v.

COURIER-JOURNAL AND
LOUISVILLE TIMES COMPANY and
UNKNOWN DEFENDANTS - - - - - - - *Defendants*

ORDER

Defendant, Courier-Journal and Louisville Times Company, having moved the Court to dismiss the Complaint and the Court being sufficiently advised;

IT IS ORDERED that the Motion is hereby granted for all claims concerning the July 3, 1993 editorial cartoon. The remainder of the Motion is overruled subject to the right of Defendant to renew said Motion at an appropriate time.

IT IS FURTHER ORDERED that Plaintiff shall have 60 days from the date of this order to conduct discovery on the limited issues of the existence of sources as stated in the editorials and the information conveyed by these sources; and that in responding to said discovery requests Defendant is not required to disclose the identification of any confidential sources or any information that might lead to the identification of confidential sources. The Defendant shall serve answers, and objections if any, to interrogatories within 10 days after service thereof.

_____
Special Judge
Jefferson Circuit Court

Entered:_____

Have Seen and Agreed To:

/s/ Philip C. Kimball
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Counsel for Defendant

EXHIBIT F

DIVISION EIGHT

JEFFERSON CIRCUIT COURT

No. 94-CI-2472

JACQUELINE K. SCHROERING - - - - - - *Plaintiff*

v.

COURIER-JOURNAL AND
LOUISVILLE TIMES COMPANY and
UNKNOWN DEFENDANTS - - - - - - - *Defendants*

ORDER

This matter having come on for a hearing on the defendant's motion for a summary judgment pursuant to CR 56.01; the Court having reviewed the briefs from both parties and heard arguments at a hearing on January 26, 1995 with the attorneys for both parties present, the Court having rendered its decision as set forth in the video record and the Court being otherwise sufficiently advised; therefore,

IT IS ORDERED that defendant's motion for summary judgment be and hereby is SUSTAINED and this action is dismissed with prejudice at the plaintiff's cost.

There being no reason for delay; this is a final and appealable Judgment.

/s/ [Illegible]
Special Judge,
Jefferson Circuit Court

Entered: January 26, 1995

Supreme Court, U.S.
FILED
FEB 13 1997
CLERK

No. 96-1110

In The

Supreme Court of the United States

October Term, 1996

JACQUELINE SCHROERING,

Petitioner,

v.

THE COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY and UNKNOWN DEFENDANTS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner seeks this Court's review based on the following framed questions:

> Are statements, defamatory per se at common law, that impute inappropriate courtroom behavior and legal incompetence to a sitting judge absolutely privileged under the First Amendment to the Constitution of the United States because purportedly incapable of being proven true or false?
>
> May "Absence of malice" be said to be conclusively established in a media/public figure defamation case where the plaintiff has not been given a fair opportunity to complete her discovery?

PARTIES TO THE PROCEEDING

The parties to this proceeding are as named to the Petition and this Brief in Opposition. At no time below has Petitioner identified the "Unknown Defendants" named in this action. Pursuant to Sup. Ct. R. 29(6), Respondent states that the Courier-Journal and Louisville Times Company is a wholly-owned subsidiary of Gannett Co., Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Courier-Journal and Louisville Times Company ("the Courier-Journal"), respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the April 26, 1996 Opinion Affirming rendered by the Kentucky Court of Appeals.

OPINIONS BELOW

The Opinion Affirming of the Court of Appeals, which was the highest state court to actually review and decide the case, is reprinted at Appendix 2a to the Petition. The Opinion Denying Discretionary Review of this case entered by the Supreme Court of Kentucky is reprinted at Appendix 1a to the Petition.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Before this high Court today is an action initiated almost three years ago in which the Petitioner, defeated in her bid for reelection to a state district court, sued the newspaper that refused to endorse her. Specifically, she

claims that she was defamed by three endorsement editorials that both identified and explained the newspaper's candidate choices for the 1993 primary and general election.[1]

That this unseated officer of the court has for the last three years employed what she must recognize from experience as the already overextended judicial resources of this community to vent her frustrations over a resounding political defeat is a travesty to say the least. Much more egregious, however, is her effort in the process to trample this newspaper's, and indeed the public's, unequivocal constitutional guarantees of free speech and free press.

Under the First Amendment, newspapers and citizens have the right to criticize elected officials in the performance of their public duties. This right becomes all the more compelling in the context of a political election. Kentucky courts have recognized the need for its citizens to freely discuss the qualifications of those who choose to run for public office:

> [I]t can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.

---

[1] Petitioner attempts to resurrect for this Court a defamation claim relating to an editorial cartoon. Both at oral arguments before the circuit court and in her Reply brief to the Court of Appeals, Ms. Schroering "acquiesced" in the dismissal of any discrete claim based on the cartoon.

Sparks v. Boone, Ky. App., 560 S.W.2d 236, 238 (1977) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

The First Amendment affords every person the right to voice his or her opinion concerning matters of public concern. Whether these opinions are voiced from an opponent's megaphone atop a town square podium, across the backyard fence or in a local newspaper's editorial section, the protection is the same. This fundamental guarantee ensures that public debate on public issues remains "uninhibited, robust, and wide open" – an indispensable prerequisite to a democratic society. These vital constitutional hallmarks cannot be compromised by a frustrated candidate who happens to disagree with a particular viewpoint voiced by a newspaper in a particular campaign. Certainly, frustration or a difference of opinion is not the type of "compelling" reason necessary to warrant this Court's review.

The Kentucky Court of Appeals was absolutely correct in this defamation action to affirm summary judgment in favor of this newspaper. The Court looked to the editorial endorsements themselves to find they reflected personal opinions concerning Ms. Schroering's performance as judge and as such could not be proven false. The Court also looked to Ms. Schroering's own discovery results to find that the Courier-Journal's published statements about the then-judicial candidate were fully supported by the editorial writer's interview notes and hence could not have been made with "actual malice."

There is absolutely no reason, "compelling" or otherwise, for this highest Court to exercise its discretionary

authority to review this case. To the contrary, the Court has the obligation to put an end to this meritless action once and for all.

> Our courts should resolve free speech litigation more expeditiously whenever possible. The perpetuation of meritless actions, with their attendant costs, chills the exercise of press freedom.

Maressa v. New Jersey Monthly, 445 A.2d 376, 387 (N.J.), *cert. denied*, 459 U.S. 907 (1982). The courts below correctly held that Ms. Schroering has no basis for her defamation claims against this newspaper. Whatever her reasons for pursuing this litigation, they are not supported by the established law or the uncontroverted facts. The First Amendment absolutely protects the Courier-Journal's right to comment as it did, and to relay the opinions of others, concerning this public official's performance of her public duties and likewise to endorse her opponent as the better candidate in the election.

The Court of Appeals decision is consistent with, and expressly relies upon, well-established constitutional law. This Court's judicial resources are preciously reserved for resolutions of conflicting decisions on important federal questions – not second-chance appeals by unsuccessful political candidates.

* * *

Jacqueline Schroering filed her Complaint on May 12, 1994 against the Courier-Journal, alleging that the newspaper "falsely, maliciously and with a knowing or reckless disregard for the truth" published three "articles" and one cartoon that defamed her. In fact, the articles at issue are endorsement editorials, clearly evident from

their face, that, along with the cartoon at issue, were published in the course of a contested judicial race in which Ms. Schroering was the incumbent candidate.[2]

The newspaper immediately filed a Motion to Dismiss on the grounds that the cartoon and editorials were protected expressions of opinion and not defamatory as a matter of law. At a July 26, 1994 hearing on the motion, the Jefferson Circuit Court dismissed Ms. Schroering's claims relating to the cartoon, finding it hyperbole and nonactionable opinion. *See* Appendix 12a to Petition. The Court further indicated, but reserved so ruling, that with the exception of a few statements the remainder of the editorials are also protected assertions of opinion.

The Court stopped short of dismissing the entire lawsuit because of three statements contained in a May 15, 1993 endorsement editorial. The three statements relay opinions of certain judges and lawyers contacted by the Courier-Journal concerning their assessment of Ms. Schroering's performance as district judge:

> . . . Male and female lawyers complain of disturbing displays of emotionalism in her courtroom. . . . And, more critical, complaints persist about her legal acumen and ability to articulate her legal reasoning. Lawyers say they regularly leave her courtroom wondering whether she grasped their argument or the law it was based upon.

---

[2] As the Petition fails to provide the Court with copies of the three editorials at issue, Respondent herewith lodges the editorials with the Court as Exhibits A, B and C. The editorial cartoon, which Petitioner admitted below is nonactionable, is reproduced at 8a of the Petition. *See supra* at n.1.

See Respondent's Exhibit A as lodged with the Court. The Court found that a factual question existed as to whether any lawyers and judges in fact expressed the opinions published in the May 15, 1993 editorial and allowed Ms. Schroering to conduct discovery on that issue.

In response to Ms. Schroering's discovery requests, the Courier-Journal produced editorial writer Laurel Shackelford and Opinion Page editor Keith Runyon for deposition testimony and provided Ms. Shackelford's interview notes relating to the editorials at issue.[3] Ms. Shackelford's notes established that the Courier-Journal talked to lawyers and judges concerning their opinions of Ms. Schroering's performance.

Further, Ms. Shackelford's notes established that the May 15, 1993 editorial was a fair and accurate reflection of the gist of the opinions expressed to the Courier-Journal.[4] The notes clearly reflect that male and female lawyers in fact made complaints concerning Ms. Schroering's courtroom demeanor.

> (Source #1) Her mannerisms on the bench . . . it's like she's like a spoiled little girl. She makes faces.

---

[3] The Courier-Journal also responded to Interrogatories and a Request for Production of Documents.

[4] Though not a part of the former judge's complaint against this newspaper, the May 15, 1993 editorial's favorable comments about Ms. Schroering (*i.e.*, "takes her work seriously, does it in a timely manner and is considered honest," "regarded as tough on domestic violence") are likewise supported by the interview notes.

(Source #8) JS became angry and started yelling at the atty: Mr. [redacted] you've asked that (question). i'm not going to allow you to intimidate and harass this witness. i remember thinking that wasn't judicious. She could have been more even keeled.

(Source #9) JS temperamentally unsuitable. Practiced before her. Almost an instability. an immaturity. unpredictable. nice person. seen her cry.

(Source #7) [S]he got horrible judicial temperament. . . . She'll fly off. . . . she'll go on tangents.

(Source #10) [S]he lacks the temperament to be a judge. Many people saw her break down and cry. . . . guy came in front of her and she started giving her a lecture, he started talking back, instead of saying you will be quiet – she went off on this female harange; said court is recessed and ran out the back.

(Source #11) [H]er temperament is not very sound.

Likewise, the notes showed that certain judges and lawyers contacted by the Courier-Journal expressed an unfavorable opinion concerning Ms. Schroering's legal ability.

(Source #1) [D]oesn't have a good knowl of the law.

(Source #2) [I] can't truthful[ly] tell you that she's a good judge that she knows the law and how to apply.

(Source #5) I don't think she has the legal skills to make a fair disposition of the cases before her. . . . [D]oesn't have an intimate or even

passable knowledge of the law. . . . If had impt case and wanted a judge who would understand . . . the issues and have strength of character to do the right thing there are a no. of other judges I would choose first.

(Source #7) She has an inability to develop a consensus as to what was the appropriate legal outcome. i will disagree with judges a lot, and that's part of the game. i feel I have done my job and judge their's if I can understand the rationale the court came to. i feel as though there's that understanding that [lawyers] and judges can reach . . . can't make conclu about what she knows about the law.

(Source #8) I won't tell you she's an Einstein; sometimes I'm not sure where she's coming from when she makes rules. . . . Obviously made a gross misstatement of the law when she said police couldn't arrest her brother because they didn't witness the incident.

(Source #7) Bias isn't the problem: she doesn't have a clue. she'll go on tangents; everyone will have a hard time following her; seeing how she reached her conclusions; has a hard time interpreting arguments. . . .

(Source #11) Her legal ability is suspect.

(Source #12) On the bench, she doesn't know the law. . . . inability to view cases critically and analytically . . . can't discuss meaty, heavy critical issues.

On November 29, 1994, the Courier-Journal renewed its motion to dismiss the remaining claims, this time in the form of a Motion for Summary Judgment. As grounds, the newspaper stated that Ms. Schroering's own

discovery established conclusively that there was no factual issue as to whether the Courier-Journal accurately published the opinions expressed by its sources. The Circuit Court agreed and dismissed the remainder of the claims on January 26, 1995. *See* App. 14a to Petition. Ms. Schroering then appealed to the Court of Appeals.

On April 26, 1996, the Court of Appeals in a unanimous opinion affirmed the summary judgment granted by the Circuit Court. *See* Opinion Affirming at App. 2a-7a to Petition. In so doing, the Court of Appeals relied on the ultimate and undisputably established authority on defamation law as set forth by the United States Supreme Court. *See* Opinion Affirming (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991)).

The Court of Appeals appropriately prefaced its ruling by setting forth the constitutional standard by which all defamation actions brought by public officials must be scrutinized:

> In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964), our nation's highest court held that:
>
> > The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with

> reckless disregard of whether it was false or not.
>
> This rule was recently affirmed in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991), wherein the Supreme Court held that a public figure who seeks to recover damages from a media defendant must specifically demonstrate, by clear and convincing evidence, that the defendant had serious doubts regarding the statement's truth or was highly aware that it was probably false. Moreover, mere negligence or journalistic carelessness in making such a statement does not in and of itself establish the existence of malice. *Masson, id; Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). *See also* 50 Am.Jur.2d *Libel and Slander* §§ 32, 38 (1995). Further, at least where a media defendant is involved, statements addressing public concerns must be proven to be false before any liability for defamation may attach. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).

Opinion Affirming, App. 3a-4a to Petition.

Applying the law to the facts in this case (namely, the editorials themselves and the information gleaned by Petitioner through discovery), the Court found two basic flaws in Ms. Schroering's cause against this newspaper. The existence of either alone was more than sufficient to warrant dismissal. First, the Court found that there was no evidence in the record that the editorials concerning Ms. Schroering's performance were published with actual

malice, *i.e.*, with knowledge that they were false or in reckless disregard of the truth. To the contrary, the Court found the published opinions were supported by the editorial writer's interview notes. Second, the Court found the editorial endorsements reflecting the personal opinions of others were not subject to defamation liability because they were not capable of being proven false. Opinion Affirming, App. 6a-7a to Petition. Accordingly, the Court of Appeals held that the Courier-Journal was entitled to judgment as a matter of law and affirmed the Circuit Court's decision granting summary judgment.

Dissatisfied with the Court of Appeals' decision, Petitioner sought discretionary review from the Supreme Court of Kentucky. Adhering to the standard that discretionary review "will be granted only when there are special reasons for it," the highest state court declined to rehear the case. *See* Order Denying Discretionary Review, Petition at App. 1a.

REASONS FOR DENYING THE PETITION

Undaunted by the unequivocal law enunciated by the United States Supreme Court and the consistent rulings of two Kentucky courts that she has no legal cause to complain about commentaries relating to her performance of public duties, former Judge Schroering seeks yet another review of her meritless action.[5] Her attempt

[5] It has been estimated that half of all libel cases are nuisance cases, in which plaintiffs have no plausible hope for ultimate success on the merits but seek satisfaction from the

cannot succeed, however, because she has failed to show any "compelling reasons" that would justify a writ of certiorari here. Sup. Ct. R. 10.

The primary question Ms. Schroering puts forth in an effort to keep her campaign against this newspaper alive is one that was answered by this Court over ten years ago. In *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), the Supreme Court held that in order for a public official to succeed in a defamation against a media defendant, she must prove that the alleged defamatory statement is false. A statement that cannot be proven true or false is simply not actionable, according to this Court.

Ten years and a virtual progeny of case law later, Petitioner asks, "But, are you sure?" Is this Court sure it wants to encourage public discussion of government and public officials? Is it sure about this country's commitment to "uninhibited, robust, and wide-open" debate on public issues? Is it sure about the protections it has afforded to those "bold enough" to criticize the positions or actions or qualifications of their public officials?

Of course, at the cornerstone of the body of constitutional law that this unsuccessful judicial candidate urges be reconsidered is *New York Times v. Sullivan*, 376 U.S. 254 (1964). Yet, the only mention Ms. Schroering makes of the

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mere process. *See* Seth Godchild, "Media Counteractions: Restoring the Balance to Modern Libel Law," 75 Georgetown L.J. 315, 326 (1986) (quoting at note 72 the dissent in *Herbert v. Lando*, 441 U.S. 153, 204 (1979) in which the late Justice Thurgood Marshall stated that "many self-perceived victims of defamation are animated by something more than a rational calculus of their chances for recovery").

seminal case is in recounting a list of authorities cited by this Respondent. The omission is understandable, as is her refusal to attempt to reconcile her claims with line of decisions from this Court following *New York Times* which reinforce the right of citizens and the media to freely comment upon the conduct and qualifications of their elected officials. The established law leaves no room for argument. It fully and unequivocally supports the fact that this case was properly dismissed by all the Kentucky courts that heard it.

The Circuit Court found, and the Court of Appeals affirmed, that *as a matter of law* Ms. Schroering simply had no cognizable claims. As a matter of law, she has no claim for defamation because the opinions expressed in the endorsement editorials were not provably false and hence not capable of a defamatory meaning.[6] The Court of Appeals also found that "the record contains nothing to suggest in any way either that the statements were made with the knowledge that they were false, or that they were made in reckless disregard of the truth." Opinion Affirming, App. 6a to Petition. This absence of actual malice proof provided a second, independent ground to

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[6] If the publication is not capable of defamatory meaning in the first instance, the court is required to rule that the publication is not a defamation as a matter of law and the suit should be dismissed. This is not merely an aphorism of [state] law, it is part of the first amendment guarantee of free speech which we all enjoy as Americans.

Flip Side Inc. v. Chicago Tribune, 564 N.E.2d 1244, 1254 (Ill. App. 1990) (*citing Greenbelt Co-op Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970); *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

dismiss this case. Petitioner has no basis to cry foul at either of these grounds. Very basically, as Ms. Schroering bears the burden to prove that the statements were false in order to even state cause of action, her claims were properly dismissed when the court determined such proof had not, and could not, be made.

A. The Endorsement Editorials Do Not Contain Provably False Assertions of Fact.

Based on the Supreme Court's analysis in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), courts have held that the threshold inquiry in any defamation claim based on opinion is whether the statement could be reasonably understood as declaring or implying facts capable of being proved true or false. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); *Phantom Touring Inc. v. Affiliated Publications*, 953 F.2d 724, 730 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992); *Dworkin v. L.F.P., Inc.*, 839 P.2d 903 (Wyo. 1992). Factual verifiability is the key. Without it, there is no defamation.

> [T]he expression of opinion on matters with respect to which reasonable men might entertain differing opinions is not libelous. An assertion that cannot be proved false cannot be held libelous. *A writer cannot be sued for simply expressing the opinion of another person*, however unreasonable the opinion or vituperous the expressing of it may be. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Collins v. Cox Enterprises, 452 S.E.2d 226, 227 (Ga. App. 1994) (emphasis added.) (quoting *Kendrick v. Jaeger*, 436 S.E.2d 92 (Ga. App. 1993)).

The Court of Appeals for the District of Columbia explained the analysis in a recent case in which, after a reconsideration of its own previous decision on the issue, the Court held that criticisms of a journalist's "sloppy journalism" and unprofessional techniques were not actionable under *Milkovich*. *Moldea v. New York Times Co.*, 22 F.3d 310, 316 (D.D.C. 1994). "Reasonable minds can and do differ as to how to interpret a literary work." *Id.* Likewise, reasonable minds can and do differ as to how to rate the performance of an elected judge.

The law fully supports the Court of Appeals' holding that the Courier-Journal's published statements assessing Ms. Schroering's tenure as district judge are incapable of being proven false and are therefore nonactionable. In the courts below, the former judge states that the opinions are subject to verification. Her tendered proof defeated her own argument.

To prove that these alleged assertions of fact relating to her judicial performance are false, Ms. Schroering, quite tellingly, submitted an affidavit containing ***her opinion*** on the issue. *See* Affidavit of Jacqueline Schroering, App. 9a-11a to Petition. As to her judicial temperament, the former judge states, "***I do not believe*** that I was given to "disturbing displays of emotionalism, while I sat as a District Judge between 1986 and 1994; . . . " She asserts a similar favorable opinion of her legal acumen: "***I believe*** that I know the criminal law of Kentucky as well

as any District Judge or attorney who regularly practices in that area."[7]

Ms. Schroering's Affidavit exemplifies the very reason why these endorsement editorials are constitutionally protected and why this lawsuit was properly dismissed. Ms. Schroering, for example, does not think she exhibited any disturbing displays of emotionalism for a sitting judge. The Courier-Journal has sources who think she did. Ms. Schroering thinks she has a fine grasp of the law. The Courier-Journal talked to lawyers and judges who hold a different view. Which is correct? There is no provable answer. Clearly, these published opinions concerning Ms. Schroering's judicial performance are no more provably true or false than is the differing opinion voiced by the former judge herself. All are subjective. Accordingly, as a matter of law, none are defamatory.

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[7] Ms. Schroering also states the published opinions concerning her legal acumen and disturbing emotionalism can be proved false by listening to audiotapes of her courtroom proceedings, and reading the record of her cases. Presumably, after sitting through eight years worth of district court cases, a judge or jury would then give **their opinion** as to whether Ms. Schroering displayed any emotionalism, and whether such emotionalism was disturbing and whether she seemed, **in their opinion**, to grasp legal issues, and then perhaps, whether they agreed with **the opinions** reported in the newspaper. Under Ms. Schroering's scheme, if the opinion of the judge or jury differs from that expressed in the endorsement editorial, then the newspaper would be held liable under the laws of defamation in this state for printing a false assertion of fact. The fallacy of this position is manifest. The Court of Appeals was correct to disregard it.

Indeed, the *only* provable aspect of this case was uncontested: The Courier-Journal had sources who complained about Ms. Schroering and it accurately reported the gist of those complaints. Given the quite generous opportunity to review the contemporaneous notes of the newspaper's interviews with its sources and to listen to deposition testimony from those responsible for the editorials, Ms. Schroering did not below, nor does not now, dispute this, the only genuine issue of material fact in this case. The Courier-Journal was clearly entitled to summary judgment.

Further, Ms. Schroering wanders far astray of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and other defamation authorities when she states that the newspaper failed to disclose the underlying facts upon which it based its opinion of her. Ms. Schroering seems to suggest that the newspaper is also required to print the factual basis upon which the Courier-Journal's sources rely for *their* opinions. Under this reasoning, the publication of any public opinion poll would be subject to defamation claims unless it included in its results the factual basis on which every participant relied in forming their opinions on a particular issue. That is not the law. We all have a constitutionally protected right to voice our opinions about an elected public official's performance of his job. We have an absolute right to say "X is not doing a good job" without supplying a factual basis for that assertion. To suggest otherwise strikes at the heart of our democratic system of government and is directly contrary to established law.

The opinions expressed by the Courier-Journal and its sources concerning Petitioner's suitability for public

office are not provable assertions of fact, as they must be under *Milkovich* to survive summary judgment. Indeed,

> [u]nlike bacteria, judges cannot be placed in Petri dishes and examined under a microscope. Virtually every assessment of judicial performance – short of a purely numerical comparison of verdicts or sentences or of affirmance and reversal rates – must rely on the ***subjective*** opinions of observers.

Aisenson v. American Broadcasting Co., 220 Cal. App.3d 146, 385-86 (1990) (emphasis in original) (dismissing defamation claim because there was no evidence that media defendant aired *false* statements of fact by not reporting truthfully and accurately the results of a bar poll reflecting the opinions of lawyers on the performance of local judges). Indeed,

> [i]t may be that [Schroering] was in reality a good judge; but if so, [she] was nonetheless perceived by those who rated [her] to be otherwise. The raters had a right to their subjective views, and the [Courier-Journal] had the right to publish those collective impressions.

Wheeler v. Nebraska State Bar Ass'n, 508 N.W.2d 917, 924 (Neb. 1993) (holding that "[a] representation that a candidate is able and has proper character and temperament is simply a subjective expression of opinion"). To accept Ms. Schroering's position to the contrary would be to virtually silence all political commentary. The Court of Appeals correctly affirmed summary judgment.

B. Plaintiff Did Not, and Could Not, Present Any Genuine Issue of Material Fact as to "Actual Malice."

The Court of Appeals also found that there was no genuine issue in this case as to actual malice. Certainly, if the editorial statements were not capable of being either true or false then it would be absolutely impossible for Ms. Schroering to prove that the newspaper knew the statements were false before they were published. Further, the interview notes of the editorial writer provide undisputed proof that the Courier-Journal accurately reflected the opinions expressed by lawyers and judges to its reporter about Ms. Schroering's performance as district judge.

Ms. Schroering tells this Court she was denied the opportunity to conduct full discovery on the issue of actual malice. As stated, the Court of Appeals did not even need to reach the question of actual malice, the claims being nonactionable because the statements were not provably true or false. Nonetheless, Ms. Schroering submits she is entitled to more time for discovery and likewise more time to further harass this newspaper and add to its already large legal expenses. Whether her ultimate goal is retribution for a lost election or attaining

the names of colleagues who spoke against her,[8] a simple desire to continue discovery on a meritless case is certainly not the type of "compelling reason" that would warrant this Supreme Court's intervention.

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[8] Prior to the filing of this suit, the Courier-Journal's counsel received a letter from Ms. Schroering's counsel, which is a part of the record reviewed by the Court of Appeals. As the following excerpt from the letter suggests, Ms. Schroering's objective in bringing this defamation action was to ascertain the identities of those lawyers quoted in the editorials as complaining about her competency.

> I would appreciate any information you could provide to me in this regard. Obviously, the names of the "complaining lawyers," (both male and female, as to the displays of emotionalism charge) would most adequately address Ms. Schroering's concerns. Indeed, I have advised Judge Schroering that she would be entirely justified in filing an action against your client based upon a pre-litigation refusal to identify these lawyers, and that your client's refusal to identify them during litigation might well result in summary judgment for her upon the issue of liability.

CONCLUSION

Respondent Courier-Journal and Louisville Times Company respectfully requests that the Petition be denied.

Respectfully submitted,

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(3)

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No. 96-1110

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JACQUELINE SCHROERING - - *Petitioner*

versus

THE COURIER-JOURNAL and
LOUISVILLE TIMES COMPANY - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

This is the Petitioner's Reply to the Brief in Opposition to her Petition for a Writ of Certiorari.

As is not unusual for wrongdoers, the Respondent newspaper wants to have its cake and eat it too. Thus it seeks to persuade this Court that all of the statements of which the Petitioner complains are impossible to prove, and therefore must be categorized as opinion.

It was not so circumspect in the Courts below. Indeed, before it discovered which way the prevailing judicial wind was coming from, it freely admitted that the editorials at issue in this case, although presented to the reader in the form of opinion, were:

> . . . based on *facts* that were both disclosed to the reader in the editorial and were accessible and well-known to the community at the time. The newspaper informs its audience that it based its endorsement decision on interviews with lawyers, who complained of "disturbing displays of emotionalism" in Plaintiff's courtroom and [that] "her legal acumen and ability to articulate her legal reasoning [were lacking]."

(Transcript of Record of the Jefferson Circuit Court, Pp. 28-29, from Defendant's Motion to dismiss).

These purported facts are not difficult to identify. They may be found at pages 6-8 of the Brief in Opposition and at pages 3-6 of the Petition for Certiorari.

As to the newspaper's statement that, "Male and female lawyers complain of disturbing displays of emotionalism in here courtroom," the following facts, if such they be, were available to the editorial writer although, of course, they were never disclosed to the newspaper's readers:

1. Source #1's statement complaining of Judge Schroering's "mannerisms on the bench," and her "mak[ing] faces."

2. Source #8's statement that Judge Schroering became angry and yelled at an attorney, actions that the source opined were not "judicious," and "even keeled."

3. Source #10's statement that "Many people saw her break down and cry," (although it is not clear if Source #10 was one of them), and that, ". . . she went off on this female harange," before she, ". . . ran out the back, " of the courtroom.

4. Generic criticism's of Judge Schroering's temperment from Sources #9, #7, and #11.

While some of these statements, especially those summarized in #4, above, might fairly be characterized as pure opinion, the intimations that Judge Schroering made faces,

lost her temper, yelled at an attorney and "broke down and cried" and "ran out the back" of her courtroom are clearly statements of facts.

In addition, as the Respondent has never denied, they are all defamatory of a sitting judge. Furthermore, in the present posture of this case, they are all false, as Judge Schroering has denied them under oath (Petition for Certiorari, Pp. 9a-11a). Neither these facts nor any other facts were disclosed to the readers of the Respondent's statements that "Male and female lawyers complain of disturbing displays of emotionalism."

Respondent seeks to equate its defamatory statements to the simple expression of an opinion, such as, "X is not doing a good job;" Petitioner agrees that all of our citizens have "an absolute right" to make these sorts of statements about our public officials (Brief in Opposition, P. 17). Clearly, the statements at issue here are *not* simple expressions of opinion. They are either statements of purported fact or statements that imply the existence of undisclosed facts. Either way, since they are defamatory, they are actionable, *Milkovich* v. *Lorain-Journal,* 110 S.Ct. 2695, 2606-2607 (1990).

Obviously both the undisclosed facts upon which the Respondent based its defamatory statements and any similar facts that the statements might conjure up in the mind of the average reader are easily capable of proof as true or false. All of us have witnessed an individual making faces, yelling, crying, running, even 'breaking down' and "losing his temper."

Unfortunately, the Courts of this nation often seem to simply dislike media defamation lawsuits. Media giants such as Gannet have amassed enormous power in our society; it is easy to dismiss lawsuits against them brought at the behest of mere individuals, and this seems to be the case no matter how much this Court emphasizes

reputational interests and the limits of the protections that it has fashioned for the media over the years. The opinion in this case and no doubt other unpublished opinions sanction the abolition of one complete category of defamation per se, that imputing unfitness in one's occupation, merely because it might require more than passing effort to prove the truth or falsity of the defamatory words in that category. Such a cavalier attitude toward the reputations of our citizens has no place in our Constitutional order.

Respectfully Submitted,

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